No. 79

In the Supreme Court of the United States

OCTOBER TERM, 1959

MIKE MILANOVICH AND VIRGINIA MILANOVICH,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Vol. III, 12-28) is reported at 275 F. 2d 716.[1]

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[1] Petitioners have lodged a three-volume, separately-paginated record in this Court, which will be referred to by appropriate volume numbers. In addition, we are lodging with the Clerk the complete six-volume trial transcript, which is consecutively paginated and which will be referred to as "Tr."

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1960. Mr. Chief Justice Warren extended the time for filing the petition for a writ of certiorari to May 7, 1960, and the petition was filed on May 6, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals properly vacated Virginia Milanovich's conviction for receiving stolen property, leaving her conviction and sentence for larceny of the same property in effect.

2. Whether the trial court's refusal to instruct witnesses excluded from the court room not to discuss their testimony was prejudicial error.

STATUTE INVOLVED

18 U.S.C. 641 provides in pertinent part:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof, or
>
> Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if

the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

* * * *

STATEMENT

Counts I and II of a four-count indictment returned in the district court for the Eastern District of Virginia charged the petitioners, husband and wife, and others with the commission of larcenies at the Post Exchange of the United States Naval Air Station, Norfolk, Virginia (Count I), and at the Commissary Store of the United States Naval Amphibious Base,[2] Little Creek, Virginia (Count II), in violation of 18 U.S.C. 641, *supra* (Tr. 1397-1398). Counts III and IV charged the petitioners with receiving and concealing the stolen goods from the installations in violation of the same statute (Tr. 1398-1399). Three accomplices pleaded guilty, and testified for the Government. Following a trial by jury, petitioners were convicted of the larceny charged in Count II (Amphibious Base), and in addition, petitioner Virginia Milanovich was convicted of receiving and concealing stolen goods charged in Count IV (goods from the Amphibious Base theft) (Tr. 1440). Petitioners were found not guilty on Counts I and III (Air Station, larceny and receiving), the court having earlier granted petitioner Mike Milanovich's motion for acquittal on Count IV (Amphibious Base, receiving)

[2] The United States Amphibious Base and the United States Naval Air Station will be referred to, respectively, as "Amphibious Base" and "Air Station."

(Tr. 1384, 1399, 1440). Mike Milanovich was sentenced to serve a term of imprisonment of five years. Virginia Milanovich received a ten-year sentence for the larceny, and a concurrent five-year term of imprisonment for the receiving. On appeal, the court of appeals vacated the conviction of Virginia Milanovich on the receiving charge, and affirmed the larceny convictions of both petitioners, one judge concurring in part and dissenting in part (Vol. III, 12-28).

The pertinent facts as to Counts II and IV, the only counts on which the jury convicted, may be summarized as follows:

1. In late May or early June 1958, Mike Milanovich drove Benjamin Guerrieri to the Commissary Store at the Amphibious Base in order for Guerrieri to look at the store safe. Mike Milanovich said that he didn't "know exactly what kind of a safe" was there, and that "it would be a good idea to take a look at it first to see what kind of equipment" would be needed (Tr. 739-740). Mike Milanovich, Guerrieri, Clayton Grimmer, and Christ Sofocleous subsequently purchased some tools from local stores (Tr. 342-346, 374, 769-770, 840-842; see Tr. 395-396, 654).

At about midnight of June 1, 1958, Mike Milanovich, accompanied by his wife, Virginia, drove Guerrieri, Grimmer, and Sofocleous to the Commissary Store at the Amphibious Base (Tr. 739-741, 782, 808-809, 824, 850, 960). Guerrieri, Grimmer, and Sofocleous got out of the car and proceeded to break into the Commissary Store, while Mike and Virginia Milanovich drove off and parked. A few hours later,

Mike rapped on the window of the Commissary and told the three men inside "to hurry up because it was almost daylight" (Tr. 741-742, 803). Shortly thereafter, the three men finished rifling the safe and left the Commissary with over $14,000 in currency and silver. They proceeded to a predesignated place where they were to be picked up by the Milanoviches (Tr. 743). When the Milanoviches did not show up, the three men buried the money in a nearby woods, and proceeded to another predesignated place, outside the base, where they were subsequently picked up by Virginia Milanovich and another woman (Tr. 743-745, 783, 803-804, 812, 827, 962). Shortly thereafter, Virginia drove one of the accomplices back to the base for the money, but the money was not retrieved because there were "too many people around" (Tr. 745, 812). That afternoon, Mike and Virginia Milanovich, together with Guerrieri, Grimmer, and Sofocleous, returned to the base for the money. The money, however, was not retrieved due to a large amount of "activity" on the base (Tr. 745-746). Guerreri, Grimmer, and Sofocleous testified that they never received any of this money (Tr. 746, 812, 965).

On June 19, F.B.I. agents secured permission from Mike Milanovich to search the Milanovich home. During the search, the agents found a suitcase which contained two loaded revolvers and silver totaling $501.60, and a lady's handbag which contained $498.20 in silver (Tr. 417, 545-546, 551; see Tr. 425). When the agents inquired as to the ownership of the handbag, Virginia Milanovich, in turn, inquired of her friend, Millie Gauger, "Don't you recall, Millie, I

loaned that to you?" (Tr. 423). Millie "would not answer" the inquiries from the agents (Tr. 424).[3]

2. At the trial, the court granted petitioners' motion to exclude the witnesses from the court room while testimony was being taken. Petitioners' additional request that the court instruct the witnesses "not to talk to anybody until his testimony is completed" was denied (Tr. 363-365, 368). The court noted that the witnesses were separated, and that it would not "nursemaid" them, or provoke a mistrial application in the event that a witness should disobey the proposed admonition.

Sofocleous testified that he spoke to Guerreri "about home" after he (Sofocleous) left the witness stand (Tr. 814). Grimmer testified that he discussed the case with his wife after she testified, and that he discussed the case "[s]omewhat" with Guerreri either by passing notes while in jail, or by talking with him while being transported from jail to court (Tr. 963-964; see Tr. 946-947). In one of the notes, Grimmer asked Guerreri what "was [he] going to do" (Tr. 766). Guerreri sent "about two" notes to Grimmer while in jail (Tr. 764), at least one of which was "more or less of a personal nature" (Tr. 766).

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[3] In late June 1958, in Cleveland, Mike and Virginia Milanovich, Guerreri, Donna Grimmer (the wife of accomplice Grimmer) and others met in the apartment of Mike Milanovich's sister (Tr. 748-749). At this meeting, Mike and Virginia Milanovich indicated that they wanted Grimmer, who was then in custody, and Guerreri to take the blame for the thefts, and that they would "compensate" the two men "in some various ways" (Tr. 750-751). In addition, Virginia Milanovich threatened to kill Donna Grimmer in the event that her husband testified (Tr. 537-540).

ARGUMENT

1. By drawing an analogy to the National Bank Robbery Act (18 U.S.C. 2113), petitioner Virginia Milanovich contends (Pet. 4-5) that the jury should have been appropriately instructed that it could not convict her of both larceny and receiving stolen goods, and that, if it were to convict her at all, the jury would have to elect between convicting her of one offense or the other. She argues that the jury was precluded from making this election when the court of appeals affirmed her larceny conviction and vacated her receiving conviction, and that, since the jury "might reasonably have convicted [her] of receiving instead of larceny, and since a lesser sentence was imposed for receiving, this Court should not allow the greater sentence to stand."

In *Prince* v. *United States*, 352 U.S. 322, this Court held that, although Congress meant to establish lesser offenses in the National Bank Robbery Act, "there was no indication that Congress intended also to pyramid the penalties" for offenses committed under that statute. *Id.* at 327. Therefore, the Court concluded that Congress did not intend to punish bank robbers both for entry into a bank with intent to rob and for the consummated robbery. Similarly, in *Heflin* v. *United States*, 358 U.S. 415, 419-420, the Court held that the National Bank Robbery Act was not intended to punish bank robbers both for the robbery and receiving stolen property. But the most that these cases require[4] is that there be no double punishment

[4] *Prince* and *Heflin* may not be controlling since the present case was tried under a different statute with its own

for acts growing out of one transaction unless that intention has been spelled out by Congress. In the instant case, the vacation of petitioner Virginia Milanovich's conviction on the receiving charge precludes any claim of double punishment for acts arising out of the same transaction. Her present ten-year sentence is within the maximum penalty for both larceny and receiving. Therefore, for purposes of sustaining her present sentence, it would be immaterial on which offense the sentence was imposed.

Moreover, this Court did not require in either *Prince* or *Heflin* that the defendant be retried so that the jury could decide on which offense the conviction should rest. Instead, the Court indicated that the entry and receiving offenses, respectively, were subordinated to the crime of bank robbery in the sense that they were intended to reach only persons not guilty of the principal offense, bank robbery. Similarly, as the court below held, the receiving offense "was intended to reach a class of persons other than those guilty of the larceny," and only if the petitioner was acquitted of the larceny could the jury convict her of receiving stolen goods. Since the jury convicted her of the larceny, its only alternative was to acquit her of the receiving charge. As the jury did not so acquit the petitioner, the court below correctly stated that acquittal could "be done as well after the verdict as before."

2. Petitioners contend (Pet. 5-6) that they were deprived of a fair and impartial trial by the court's

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legislative history. The court of appeals, however, rejected this contention advanced by the government below.

failure to admonish the witnesses to refrain from discussing their testimony with others. It is well settled, however, that the decision whether to exclude witnesses from the court room in order to prevent their modifying their stories to be consistent with the testimony of other witnesses is vested in the sound judicial discretion of the trial court, and that the court's refusal to exclude the witnesses is not an abuse of that discretion unless manifest prejudice results to the defendants. See, *e.g.*, *Holder* v. *United States*, 150 U.S. 91, 92; *Mitchell* v. *United States*, 126 F. 2d 550, 553 (C.A. 10), certiorari denied, 316 U.S. 702; *Johnston* v. *United States*, 260 F. 2d 345, 347 (C.A. 10), certiorari denied, 360 U.S. 935; *Gates* v. *United States*, 122 F. 2d 571, 577 (C.A. 10), certiorari denied, 314 U.S. 698; *United States* v. *5 Cases, etc.*, 179 F. 2d 519, 522 (C.A. 2), certiorari denied, 339 U.S. 963. It follows *a fortiori* that when the court does exclude the witnesses, as in the instant case, its refusal to admonish the witnesses to refrain from discussing their testimony is also clearly within its judicial discretion in the absence of manifest prejudice. See *United States* v. *Chiarella*, 184 F. 2d 903, 906-907 (C.A. 2).[5]

Here, no showing has been made that the petitioners were prejudiced. On the contrary, each of the conversations between witnesses was clearly not harmful. Sofocleous testified that he merely spoke to Guerreri "about home," and Grimmer stated that he had only

[5] The court of appeals on rehearing vacated the sentence on two of the four counts on other grounds, 187 F. 2d 12, remanded for resentencing, 341 U.S. 946.

discussed the case "[s]omewhat" with Guerreri.[6] Moreover, the brief and nondetailed nature of the direct examination of Grimmer (Tr. 849-851) precluded any reasonable possibility that either he and Guerreri or he and his wife matched the testimony of the other. And the fact that Grimmer and his wife testified to altogether different stages of the case eliminated any possibility that they had matched their testimony. See *United States* v. *Cephas*, 263 F. 2d 518, 521 (C.A. 7; *Witt* v. *United States*, 196 F. 2d 285 (C.A. 9).[7]

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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Solicitor General.

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Attorney.

JUNE 1960.

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[6] Compare *Holder* v. *United States*, *supra*, where the witnesses were ordered to leave the courtroom, but one remained. This Court, noting that the witness could be proceeded against for contempt, sustained the conviction even though the witness testified after hearing the testimony of other witnesses. Clearly, there was a much more serious possibility of prejudice than in the instant case.

[7] Contrary to petitioners' assertion (Pet. 5-6), the fact that certain witnesses had talked together was not brought to the trial judge's attention until after these witnesses had testified. (Compare Tr. 363-368 with Tr. 764-766, 814, 946-947, 963-964.)

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